

The respondent requests review of the nature and extent of claimant's disability. Respondent initially notes that the treating physician released claimant from treatment with neither permanent restrictions nor a functional impairment. Consequently, respondent argues claimant only suffered a temporary injury and is not entitled to further compensation. In the alternative, respondent first argues claimant only suffered a scheduled injury to her shoulder and again notes that the treating physician concluded claimant had recovered without any permanent impairment. Respondent next argues that if it is determined claimant suffered a permanent whole body impairment she should be limited to her functional impairment because she was terminated from employment for cause unrelated to her injury. Lastly, respondent argues that if claimant is entitled to a work disability a wage should be imputed to her because she failed to make a good faith effort to find appropriate employment.

The claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant complained of pain in her right neck and shoulder from performing her repetitive work activities for respondent. Respondent does not deny the right shoulder injury but denies claimant suffered injury to her neck.¹

Initially, it must be determined whether claimant suffered only a scheduled injury to the right shoulder. If so, her entitlement to benefits would be pursuant to K.S.A. 44-510d(a)(13) (Furse 2000). If, however, she also suffered permanent impairment to her neck, then her entitlement to benefits would be pursuant to K.S.A. 44-510e(a) Furse 2000.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to assess the medical testimony, along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by the medical evidence presented in the case and has a responsibility of making its own determination.²

The claimant initially sought treatment for her neck and right shoulder complaints with her personal physician. She was provided medications and physical therapy. Respondent then referred claimant to Dr. F. Allen Moorhead Jr. for further treatment.

¹ R.H. Trans. at 4.

² *Tovar v. IBP, Inc.*, 15 Kan App. 2d 782, 817 P.2d 212, *rev denied* 249 Kan. 778 (1991).

Claimant first saw Dr. Moorhead on April 26, 2002, with complaints of right shoulder and neck pain. Dr. Moorhead referred claimant for physical therapy and limited her activities. The doctor diagnosed claimant's problem as a lack of strength and concluded claimant would improve with conditioning exercises as well as physical therapy.

On May 17, 2002, Dr. Moorhead released claimant from treatment but recommended that she complete an additional 30 days of physical therapy. The doctor did not impose any restrictions and he concluded claimant had not suffered any permanent impairment of function because she had a full range of motion.

At her attorney's request, the claimant was examined by Dr. Pedro A. Murati on June 5, 2002. Dr. Murati noted that claimant's primary complaint was right shoulder and neck pain. Upon examination, Dr. Murati detected trigger points in claimant's right shoulder girdle extending into the cervical paraspinals. He further detected right shoulder crepitus as well as some loss of range of motion.

Dr. Murati opined claimant had suffered a permanent impairment as a result of her repetitive work activities with respondent. The doctor diagnosed claimant with myofascial pain syndrome affecting the neck and right shoulder girdle. Utilizing the *AMA Guides*³, Dr. Murati rated claimant with a 5 percent permanent partial functional impairment to the right shoulder for loss of range of motion, which converts to a 3 percent whole person impairment. And for the myofascial pain syndrome affecting the neck the doctor concluded claimant fit the DRE Cervicothoracic Category II, for a 5 percent whole person impairment. These whole person impairments combine for an 8 percent whole person impairment.

Lastly, Dr. Murati imposed permanent restrictions that claimant is not to climb ladders, crawl, do above-shoulder work with the right or left, carry, push or pull over 20 pounds. Claimant can occasionally lift, carry, push or pull 20 pounds. And claimant can frequently lift, carry, push or pull 10 pounds. Finally, claimant is to work no more than 18 inches from her body with the right upper extremity and is to avoid awkward positions of the neck.

The claimant continues to complain of pain from the base of her skull down her neck and into the top and back of her right shoulder. Claimant noted that she continues to have knots in her neck.

As the ALJ noted, Dr. Murati made objective findings of trigger points in claimant's neck, which are a localized area of muscle spasm. At regular hearing, the claimant testified that she continued to have those "knots" in her neck. And the physical therapy treatment and progress notes had repeated references to neck pain as well as therapy

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

modalities for that condition.⁴ The Board is persuaded that as a result of her repetitive work activities the claimant suffered an injury to her neck as well as her shoulder, which Dr. Murati diagnosed as myofascial pain syndrome.

Respondent argues the Board should adopt the treating physician's opinion that claimant did not suffer any permanent functional impairment. Although Dr. Moorhead did not impose restrictions he did agree that if claimant did not get herself in better condition she would have additional shoulder problems if she attempted to perform repetitive work activities. The doctor noted that claimant has poor upper body strength and tends to lean forward with her neck.⁵ The doctor concluded claimant was not entitled to a permanent impairment rating because she exhibited a full range of motion and no loss of function upon examination. But the doctor agreed that if claimant did not increase her strength through exercise then she would have an impairment. Lastly, the doctor agreed that he told claimant she should not perform repetitious type work activity.

Conversely, Dr. Murati concluded claimant had suffered a permanent impairment and imposed permanent restrictions. The Board is persuaded, in this instance, that Dr. Murati's opinion more appropriately conforms to claimant's continued and consistent complaints of right shoulder and neck pain from the date of the accident. Consequently, the Board determines claimant has an 8 percent permanent partial functional impairment to the whole body.

Respondent argues that claimant should be limited to her functional impairment because she was terminated for violation of its three day no call/no show policy. Respondent argues that after claimant was released from treatment by Dr. Moorhead that she never returned to work. But claimant testified that she understood that when she was released from treatment by Dr. Moorhead she was given restrictions against repetitious activity as well as lifting over 20 pounds. Claimant further testified that she called respondent and was told her restrictions could not be accommodated. The claimant noted:

Q. [Mr. Phalen] Was it your understanding you were given restrictions by Dr. Moorhead?

A. Yes.

Q. What was your understanding of those restrictions?

A. That there wasn't no lifting over 20 pounds, repetitious movements and lifting.

Q. And did you call Sands Level company?

⁴ Moorhead Depo., Ex. 4.

⁵ Id. at 12.

A. I called - -

Q. Yes?

A. Yes.

Q. Did you ask about a job?

A. Yes.

Q. And did you tell them the restrictions?

A. Yes.

Q. And what did they tell you about coming back to work?

A. They told me they did not have any place, I mean work without those, or with those deals.

Q. So they told you they didn't have a job within those restrictions?

A. Yes.

Q. Have they ever called you and offered you an accommodated job?

A. No.

Q. Have they ever called since your injury and asked you come back to work?

A. No.⁶

Respondent agreed that it did not provide light duty or accommodated positions.

In the 1999 *Niesz*⁷ case the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons that were unrelated to the work injury. Consequently, the Court of Appeals held that Ms. Niesz was entitled to receive a work disability after being fired, when the circumstances surrounding the termination do not demonstrate bad faith on the worker's part. In this case the claimant called respondent after being released from treatment and was told there were no jobs available with the restrictions she understood she had received from the doctor. It cannot be said claimant acted in bad faith in failing to return to work with respondent. The Board concludes claimant is entitled to a work disability analysis.

⁶ R.H. Trans. at 23-24.

⁷ *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a) (Furse 2000). That statute provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk*⁸ and *Copeland*.⁹ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Claimant provided a document that indicated she had sought employment at 14 different businesses and she further testified she had also applied for jobs not listed on that document which included all the businesses in the town of Neodesha. But the claimant did not limit her job search to Neodesha she also looked for work in the surrounding towns of Fredonia and Independence. The claimant further noted that she had made repeated visits to the employers listed on her document.

The claimant is a single mother with two young daughters who, at the time of the regular hearing, were 5-years old and 21-months old. Moreover, Karen Terrill, a vocational expert, indicated that claimant has problems learning, did not complete high school and is basically illiterate. Considering claimant's lack of education, training, her limited work

⁸ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995)

⁹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

experience, together with her geographic location, the Board agrees with and adopts the ALJ's determination that the claimant made a good faith effort to obtain appropriate employment.

Consequently, the Board affirms the ALJ's Award finding claimant suffered an 84.5 percent work disability based upon a 100 percent wage loss and a 69 percent task loss.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated June 26, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director